INDEX

AUTHORITIES CITED

Cases:

IN THE

Supreme Court of the United States

TERM 1971

No. 71-564

DISTRICT OF COLUMBIA,

Petitioner,

v.

MELVIN CARTER,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING

SUMMARY OF ARGUMENT

On January 10, 1973, this Court reversed the judgment of the court below on the ground that the District of Columbia was not a "State or Territory" within the meaning of 42 U.S.C. §1983. This decision was premised on the following explicit assumptions:

(1) that the Civil Rights Act of 1871, enacted primarily to enforce the Fourteenth Amendment, was aimed solely at

regulating procedures in the states, and was not intended to be applicable to the District of Columbia;

(2) that 42 U.S.C. §1983 is derived solely from the Civil Rights Act of 1871, and is therefore limited in its application to the targets of that statute; and

(3) that although the District of Columbia had a territorial government from 1871-74, that fact does not bring the District within the meaning of the phrase "State or Territory" because the words "or Territory" were not enacted until June 20, 1874, the same day that Congress abolished the "territorial" form of government in the District of Columbia (slip op., n. 25).

Since the issue of the District's inclusion within the phrase "State or Territory" was never raised until oral argument before this Court, appellees had no occasion to research the question prior to argument, nor did the three-day period allowed for filing post-hearing supplementary memoranda furnish adequate time for the research.

Subsequent research, conducted since the Court's opinion, now reveals compelling evidence in the legislative history which points to contrary conclusions on all three of these basic assumptions.

I. THE CIVIL RIGHTS ACT OF 1871 WAS NOT INTENDED TO BE LIMITED TO THE STATES, BUT WAS MEANT TO APPLY THROUGHOUT THE UNITED STATES.

The Civil Rights Act of April 20, 1871, was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and

for Other Purposes"[1] (emphasis added). It is apparent from President Grant's implementing proclamation of May 3, 1871,[2] that the Act was intended to apply not merely to the states, but throughout the country. In the same clear and unequivocal language that had been used by the 39th Congress to describe the intended coverage of the 1866 Civil Rights Act, some five years earlier,[3] President Grant declared that

> This law of Congress *applies to all parts of the United States*, and will be enforced *everywhere*, to the extent of the powers vested in the Executive (emphasis added).

Only after noting this universal applicability of the Act does President Grant proceed to "particularly exhort" those citizens in the more turbulent areas, whose activities led to the enactment, to voluntarily suppress violence in their areas.

The President proceeds to express his

> "earnest wish that peace and cheerful obedience to law may prevail throughout the land, and that all traces of our late unhappy civil strife may be speedily removed. These ends can be easily reached by acquiescence in the results of the conflict, now written

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[1] If, as the Court assumes, the statute were intended merely to enforce the Fourteenth Amendment, there would be no necessity for the last four words of its title.

[2] 17 Stat. 949-50 (see copy attached hereto as "Appendix A").

[3] Slip opinion, p. 5, n. 7.

> in our Constitution, and by the due and proper enforcement of equal, just, and impartial laws *in every part of our country* (emphasis added).[4, 5]

II. 42 U.S.C. §1983 WAS INTENDED TO ENFORCE THE CIVIL RIGHTS ACTS OF 1866 AND 1870, AS WELL AS THE CIVIL RIGHTS ACT OF 1871.

In *Hurd v. Hodge*, 334 U.S. 24, 31 (1948), this Court held that the District of Columbia was included within the phrase "State or Territory" in 42 U.S.C. §1982. In the instant case, the Court has distinguished the *Hurd* determination by linking §1982 with the Civil Rights Act of

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[4] President Grant's sweeping language is wholly consistent with the title of the Act. Just as the writ of the new law was to run to "every part of our country," so was the aim of the Act not merely to enforce the provisions of the Fourteenth Amendment, but also "for other purposes." It may be inferred from the proclamation that one such purpose was to enforce the Thirteenth, as well as the Fourteenth Amendment, since both of these Civil War amendments are presumably included within the reference to "the results of the conflict, now written in our Constitution."

[5] There can, of course, be no question of Congress' power to legislate for the District under Article I, §8 cl. 17. It is significant that Congress' power to tax and legislate for the District was expressly adverted to during the debates on the Act of April 20, 1871 in the context of discussing the power of a legislature to make a local unit respond in damages. Cong. Globe, April 19, 1871, p. 799 (Rep. Smith). Although the question had not been squarely raised, Rep. Smith thought it relevant to point out that Congress already possessed the power over the District which was implicit in the bill then being discussed. *Ibid.*

April 9, 1866, Ch. 31, §1, 14 Stat. 27, which Act was enacted to implement the Thirteenth Amendment, the scope of which is undeniably nationwide (see cases cited at slip op., p. 4). Since, as the following history indicates, what is now §1983 was intended to enforce the 1866 Civil Rights Act as well as those of 1870 and 1871, the inference is inescapable that the District of Columbia must be included within its scope.

The Civil Rights Act of April 9, 1866, c. 31 §1, 14 Stat. 27, provides, in part, that:

> All . . . citizens . . . shall have the same right, in every State or Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of the person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

After the enactment of the Fourteenth Amendment in 1868, the original Civil Rights Act was reenacted in the enforcement act of May 31, 1870, 16 Stat. 144, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State or Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be

> subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

On April 20, 1871, the Ku Klux Klan Act[6] was enacted as a companion statute to the Civil Rights Act of 1866.

In 1872, these three statutes were revised and consolidated by the revisory commission[7] as follows:

> Title XXVI *Civil Rights*
>
> Section 1. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make

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[6] "Any person who under cover of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any law, statute, ordinance, regulation, custom, or usage of the state to the contrary, notwithstanding, be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress; *such proceeding to be prosecuted* in the several district or circuit courts of the United States, *with and subject to the same rights of appeal*, review upon error, *and other remedies provided in like cases* in such courts *under the provisions of the Act of the 9th of April, 1866*, entitled "An Act to Protect All Citizens in the United States in Their Civil Rights, and to Furnish the Means of Their Vindication," and the other remedial laws of the United States which are in their nature applicable in such cases" (emphasis added).

[7] The revisory commission of "three persons, learned in the law" was appointed by the Congress "to revise, simplify, arrange and consolidate" all statutes of the United States. Act of June 27, 1866 (39th Cong., 1st Sess., c. 140, 14 Stat. at L., 74). (continued)

and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 2. All citizens of the United States shall have the same rights, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 3. Every person who, under color of any statute, ordinance, regulation, custom, or

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[7] (continued)

The intended function of the Commissioners was described as follows by Rep. Lawrence:

> The commissioners were duly appointed, and executed a part of the work assigned them, when the term expired. Congress, by act of May 4, 1870, revived the original statute, and authorized the appointment of three commissioners to complete the work within three years. (16 Statutes, 96.) The commissioners were duly appointed. They were authorized not merely to copy and arrange in proper order, and classify in heads the actual text of statutes in force, but to 'supply the omissions and amend the imperfections of the original text.' In executing this work they very often translated into their own language the ideas and objects of statutes, so that the new form adopted might be said to be *inspired by Congress in ideas*, but not in words. This mode frequently condensed existing laws, and thus often improved them.

> usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[8]

The Act of March 3, 1873, 17 Stat. 579, authorized the Committee of the Senate and the House of Representatives on the Revision of the Laws to "contract with some suitable person to prepare . . . the revision of the statutes then already reported by the commissioners, or which might by them be thereafter reported before the 4th of May, 1873" in a form which might be acted upon by the Congress at the opening of the session of December, 1873.

Mr. Durant was chosen to undertake this revision, and Durant's Revision was reported to the Committee on Revision (Rep. Poland, Chairman) in December, 1873.

Durant's Revision carried over intact as Sections 1982, 1983 and 1984 the same language that was used by the Commissioners in Sections 1, 2 and 3 of Title XXVI.

On January 21, 1874, Rep. Lawrence took the floor of the House to explain in detail the process by which the sequence and content of these three related sections

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[8] Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose, Washington, Government Printing Office, 1872, Vol. I, p. 947.

was developed. After quoting at length from the Civil Rights Acts of 1866 and 1870, Rep. Lawrence stated as follows:

> The Commissioners, in Vol. I, p. 947, Title XXVI and Sections L, 2 and 3, and Mr. Durant in his volume of General Laws, p. 432, Title XXIV, Sections 1982, 1983 and 1984, both, under the head of "Civil Rights," translate the sections I have cited from the Acts of 1866 and 1870, so far as they relate to a declaration of existing rights, *and confer a right of civil action for their violation* as follows: [Rep. Lawrence then quotes Sections 1, 2 and 3 from the Commissioners' Draft, which are set forth at pp. 6-8, *supra*].[9]

The sum and substance of this explanation, to which no objection was raised, is that Sections 1 and 2 of the Commissioners' Draft were intended to restate the substance of the Civil Rights Acts of 1870 and 1866, respectively, while Section 3 was intended to "confer a right of civil action for their violation."[10] To accomplish this purpose, the Commissioners had found it necessary to add the words "or Territory" to the third section. Only by this addition could the enforcement section be coextensive with the 1866 and 1870 Acts which it was intended to enforce.[11]

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[9] Cong. Record, Vol. 2, Pt. 1, 43rd Cong., 1st Sess., p. 828.

[10] Of course, Section 3 of the Commissioners' Draft also carried forward the corresponding provision of the Act of April 20, 1871.

[11] Because of the brevity of the 3-day period allowed for filing the post-hearing briefs on this issue, counsel did not find Rep.

(continued)

Sections 1, 2 and 3 of the 1872 Commissioners' Revision have been carried forward intact through Durant's Revision, through the Revised Statutes of 1874 and exist today, verbatim, as §§1981, 1982 and 1983 of Title 42. The following table shows the corresponding section designations:

Commissioners' Revision (draft) of 1872	Durant's Revision (1873)	Rev. Stat. (1874)	U.S. Code Title 42
Title XXVI §1	§1982	§1977	§1981
§2	§1983	§1978	§1982
§3	§1984	§1979	§1983

The implications of this legislative history for the present issue, and in terms of current U.S. Code designations, would appear to be inescapable: What we now know as §1983, in addition to embodying the cause of action created by the Act of April 20, 1871, was intended to confer a civil action for violations of what are now §§1981 and 1982, and the phrase "or Territory" was added in order to make the scope of §1983 co-extensive with the two preceding sections. It necessarily follows that the phrase "State or Territory" was intended by the revisory commission in 1872 to have the same scope in all three sections. This Court's earlier determination in *Hurd* that the District is included within §1982 thus dictates a similar inclusion in §1983.

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11 (continued) Lawrence's explanation, which constitutes a rather critical piece of the legislative history. Accordingly, the Court was misled into thinking that "The phrase 'or Territory' was added, without explanation, in the 1874 codification and revision of the Statutes at Large" (slip op., p. 7, n. 11).

III. THE DISTRICT'S TERRITORIAL STATUS AT THE TIME THE WORDS "OR TERRITORY" WERE ADDED FURNISHES FURTHER SUPPORT FOR THE DISTRICT'S INCLUSION IN §1983.

In appellee's post-argument memorandum, it was pointed out that as of February 21, 1871 the District of Columbia possessed all of the essential attributes of a "Territory" and that several members of Congress referred to that Act as creating a territorial government for the District of Columbia.[12] Appellees believe that the several characterizations in the Congressional Globe of the Act of February 21, 1871 as creating a "territorial" government for the District of Columbia, together with the terms of the Act itself, indicate rather clearly that the Congress of 1871 intended to constitute and did in fact constitute the District a "Territory" by the said Act, which status still existed in 1872 when the words "or Territory" were added to what is now §1983.

The addition of the words "or Territory" in the 1872 revision leads inescapably to the conclusion that the District of Columbia was intended to be included, since the District was in law and in fact a "Territory" from February 21, 1871 until June 20, 1874.

In its opinion, the Court rejects the inference of intended inclusion of the District in §1983 on the ground that the District ceased to have a territorial government on the day the words "or Territory" were formally added to the statute (slip op., p. 12, n. 25). This conclusion distorts the relevant legislative history.

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[12] Supplemental Memorandum, pp. 1-3

As has been pointed out, the words "or Territory" were first added to the revised statute in 1872 in the draft of the revisory commission published in that year (Vol. I, p. 947, Title XXVI, §3). The Act of June 20, 1874, c. 337, 18 Stat. pt. 3, 116, which abolished the territorial government for the District of Columbia was first reported to the House on June 16, 1874, as HR3680, and in the space of four days was passed by the House (June 17), passed by the Senate (June 18) and approved by the President (June 20). "Learned in the law" as the commissioners may have been, it requires an undue attribution of prescience to assume that the revisory commission in 1872 could have anticipated that the District's territorial status would be changed some two years later.[13]

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[13] On the contrary, any such inference was expressly negated by the statement of Rep. Poland, Chairman of the Commission on Revision of the Laws, in introducing the revised laws to the Congress: "I understand that we are proceeding upon an entire ignoring of anything that may be done during this session in the way of making laws. We are endeavoring to ascertain and set down what was the law at the beginning of this session, as if no Congress was ever to meet again and no new law to be passed." Cong. Globe, 43rd Cong., 1st Sess., January 21, 1874, p. 825.

IV. CONGRESS INTENDED ARTICLE III COURTS TO BE AVAILABLE TO PROTECT CONSTITUTIONAL RIGHTS IN THE NATION'S CAPITAL.

As this Court recognized in its opinion, it was of great concern to Congress to assure that Article III courts, in which judges are protected by life tenure, were available throughout the United States to protect constitutional rights (Slip op., note 28). Surely Congress knew that the court system of the District of Columbia, then an Article III system, could be changed by legislation. It seems unlikely that Congress, intent upon protecting Constitutional rights in all places in the United States, including the territories, would have excluded the District of Columbia. Such an oversight would mean that, today, the District of Columbia – the seat of the national government – would be the only jurisdiction in the United States in which citizens could not rely upon judges with life tenure for the protection of constitutional rights.[14]

Clearly, judges of the local court system in the District of Columbia are "peculiarly susceptible to . . . pressures, since their appointments . . . [are]dependent upon favorable recommendations" (Slip op., note 28) by the Department of Justice.[15] In May 1971, the District

[14] The problem is not resolved by federal question jurisdiction, under 28 U.S.C. Section 1331, where more than $10,000 is in controversy. The existence of 42 U.S.C., Section 1983 has dispensed with the necessity for the courts to deal with the monetary value to be placed on such non-economic constitutional rights as freedom of speech and assembly, and freedom from police misconduct.

[15] Judges of the Superior Court of the District of Columbia are appointed for 15 year terms by the President (D.C. Code, Sections 11-1501, 11-1502).

of Columbia Police Department arrested 13,000 persons in a single week, yet only a handful were subsequently convicted of any offense.[16] The City prosecutor, reportedly under pressure from the Department of Justice to obtain convictions,[17] complained to the Justice Department that the local judges were dismissing too many of these cases. The problem of attempting such blatant pressure against term judges was implicitly recognized by the Chief Judge of the local court when he expressed concern at the Corporation Counsel's actions.[18]

The inherently compromising pressures of the power of reappointment are further buttressed by a Commission on Judicial Disabilities and Tenure, empowered to remove

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16 See The Washington Post, May 27, 1971, p. A-1; *May Day 1971: Order Without Law, An ACLU Study of the Largest Sweep Arrests in American History* (July 1972). On May 26, 1971, the United States Court of Appeals for the District of Columbia Circuit issued a temporary restraining order enjoining further prosecution of "any cases . . . in which appellees do not reasonably believe that they have in their files and records adequate evidence to support probable cause . . ." *Sullivan v. Murphy*, D.C. Cir. No. 71-1395, Order of May 26, 1971. This order resulted in the dropping of charges in the few thousand remaining cases. The Washington Post, May 27, 1971, p. A-1; October 2, 1971, p. A-1.

17 The Washington Daily News, May 19, 1971, p. 3. The President and the Justice Department both praised the police actions and vowed that similar measures would be taken against future demonstrations, if deemed necessary. The Washington Post, June 2, 1971, p. A-1; May 11, 1971, p. A-1.

18 The Washington Post, May 30, 1971, p. A-9.

judges for "any . . . conduct which is prejudicial to the administration of justice . . ." (D.C. Code, Section 11-1526). Three of the five members of this Commission are appointed by the President, and a fourth is appointed by the Mayor of the District of Columbia (who is appointed by the President) (D.C. Code, Section 11-1522). The Commission has publicly warned that it is maintaining close surveillance on the Superior Court judges.[19]

The safeguards of Article III are designed, in large part, "for the benefit of the whole people." *O'Donoghue v. United States,* 289 U.S. 516, 532-34 (1933). These safeguards, this Court has said, "promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution . . ." *Evans v. Gore,* 253 U.S. 245, 253 (1920). The people of the District of Columbia are entitled to "all the rights, guaranties, and immunities of the Constitution, among which . . . [is] the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Article III." *O'Donoghue v. United States, supra,* 289 U.S. at 540.

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[19] The Washington Post, November 4, 1971, p. B-1.

CONCLUSION

The legislative history outlined in the foregoing sections, and the long and deeply recognized necessity of judicial independence, compel the conclusion that Congress never intended to exclude the District of Columbia from the protection which Article III courts extend in all other parts of the United States. Accordingly, and particularly in light of the newly-discovered legislative history set forth above, the respondent asks for a rehearing on the question of the District's inclusion in what is now 42 U.S.C. §1983.

Respectfully submitted,

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APPENDIX A

No. 2.

May 3, 1871. BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Attention of the people called to the act, 1871, ch. 22, post, p. 22.

THE act of Congress, entitled "An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes," approved April 20, A. D 1871, being a law of extraordinary public importance, I consider it my duty to issue this my proclamation calling the attention of the people of the United States thereto; enjoining upon all good citizens and especially upon all public officers, to be zealous in the enforcement thereof, and warning all persons to abstain from committing any of the acts thereby prohibited.

Law to be enforced everywhere.

This law of Congress applies to all parts of the United States, and will be enforced everywhere, to the extent of the powers vested in the Executive. But inasmuch as the necessity therefor is well known to have been caused chiefly by persistent violations of the rights of citizens of the United States, by combinations of lawless and disaffected persons in certain localities lately the theatre of insurrection and military conflict, I do particularly exhort the people of those parts of the country to suppress all such combinations by their own voluntary efforts through the agency of local laws, and to maintain the rights of all citizens of the United States, and to secure to all such citizens the equal protection of the laws.

People in certain localities particularly exhorted to suppress illegal combinations, &c.

Fully sensible of the responsibility imposed upon the Executive by the act of Congress to which public attention is now called, and reluctant to call it exercise any of the extraordinary powers thereby conferred upon me, except in cases of imperative necessity, I do, nevertheless, deem it my duty to make known that I will not hesitate to exhaust the powers thus vested in the Executive, whenever and wherever it shall become necessary to do so for the purpose of securing to all citizens of the United States the peaceful enjoyment of the rights guaranteed to them by the Constitution and laws.

The Executive power to be fully used in return to all citizens their constitutional legal rights.

It is my earnest wish that peace and cheerful obedience to law may prevail throughout the land, and that all traces of our late unhappy civil strife may be speedily removed. These ends can be easily reached by acquiescence in the results of the conflict, now written in our Constitution, and by the due and proper enforcement of equal, just, and impartial laws in every part of our country.

How peace and cheerful obedience to law may be made to prevail, &c.

The failure of local communities to furnish such means for the attainment of results so earnestly desired imposes upon the National Government the duty of putting forth all its energies for the protection of its citizens of every race and color, and for the restoration of peace and order throughout the entire country.

The National Government to protect citizens and restore peace and order where local governments fail, &c.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this third day of May, in the year [SEAL.] of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-fifth.

U. S. GRANT.

By the President:

HAMILTON FISH, *Secretary of State.*